LIBRARY
SUPREME COURT, U.S.

Office Supreme Court, U. S.
FILED
JAN 3 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 131

J. W. WHITEHOUSE, G. ORNDORFF, J. H. SYLVESTER, CLAUDE R. BARNES, R. SARCHETT AND THE ORDER OF RAILROAD TELEGRAPHERS, *Petitioners*,

v.

ILLINOIS CENTRAL RAILROAD COMPANY, WILLIAM H. CASTLE, R. M. BUTLER, C. P. DUGAN, E. T. HORSLEY AND J. E. KEMP, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals For the Seventh Circuit

BRIEF FOR THE PETITIONERS

MILTON KRAMER
LESTER P. SCHOENE

SCHOENE AND KRAMER
1625 K Street, N. W.
Washington 6, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement	4
Summary of argument	6
Argument	9
I. The District Court was without jurisdiction to grant an injunction because the Railroad had not exhausted its administrative remedies	9
II. The action was premature because the Board's decision may be in accord with the Railroad's contentions. There is thus no case or controversy	13
III. The District Court lacked jurisdiction of the subject matter because the judicial remedy specified by the Railway Labor Act for a carrier challenging the validity of an award is exclusive	16
IV. The decision below transfers to the courts the resolution of questions vested in the Adjustment Board for initial decision	21
V. There is no case for injunctive relief because even if the Board should issue an invalid award the statutory remedy of a defense to an enforcement suit would be adequate	24
VI. No notice was required to be given to the Clerks	27

Page

VII. No notice was required to be given to any individual clerk 35

VIII. Even if notice to the Clerks was required, such requirement was satisfied by the Clerks' actual knowledge of the proceeding 38

IX. The Board is without jurisdiction to revise contracts to remove overlaps in their scope 41

Conclusion 45

Appendix 46

TABLE OF CITATIONS

CASES:

Aetna Life Ins. Co. v. Haworth, 300 U. S. 227 .....7, 15
Aircraft and Diesel Corp. v. Hirsch, 331 U. S. 752..6, 10, 13, 14, 25, 26
Allen v. Grand Central Aircraft Co., 347 U. S. 535 .. 6, 13, 15
Am. Air Export & Import Co. v. O'Neill, No. 12159, U.S.C.A., D. C. Cir. 12
Anniston Mfg. Co. v. Davis, 301 U. S. 337 16
Arnson v. Murphy, 109 U. S. 238 17
Ashwander v. T.V.A., 297 U. S. 288 .....6, 15, 16
Atlantic Coast Line R. Co. v. Pope, 119 F. (2d) 39 .. 25
Bro. of R. Trainmen v. Templeton, 181 F. (2d) 527 . 32
Brotherhood v. A.T.& S.F. Ry. Co., No. 52-C-320, N.D. Ill. 25
Brown v. United States, 113 U. S. 568 23
Burnet v. Desmornes y Alvarez, 226 U. S. 145 ....14, 21
Coffman v. Breeze Corp., 323 U. S. 316 15
Dahlberg v. Pittsburgh & L. E. R. Co., 138 F. (2d) 121 25
Eccles v. Peoples Bank, 333 U. S. 426 .....6, 15, 16
Edwards' Lessee v. Darby, 12 Wheat. 206 23
Elgin, J. & E. R. Co. v. Burley, 325 U. S. 711 36
Elgin, J. & E. R. Co. v. Burley, 327 U. S. 661 ..... 8, 36, 37, 38, 40
Estes v. Union Terminal, 89 F. (2d) 768 .....25, 27, 38
Forrest Harmon v. Rottgering, 106 F. Supp. 993 ... 12

Page

General Committee v. MKT R. Co., 320 U. S. 323...7, 17, 24, 34, 43, 44
General Committee v. Sou. Pac. Co., 320 U. S. 338.. 18, 35, 43, 44
General Utilities Co. v. Helvering, 296 U. S. 200 ... 37
Great A. & P. Tea Co. v. Grosjean, 301 U. S. 412 ... 15
Hunter v. A. T. & S. F. Ry. Co., 188 F. (2d) 294 38
In Re Central R. of N. J., 145 F. (2d) 351 18
Jonco Aircraft Corp. v. Franklin, 346 U. S. 11 .....6, 10
Kirby v. Penna. R. Co., 188 F. (2d) 793 .....25, 38
Lucas v. American Code Co., 280 U. S. 445 23
Macauley v. Waterman SS. Corp., 327 U. S. 540...6, 10, 11, 37
M'Keen v. Delancy's Lessee, 5 Cranch 22 23
Myers v. Bethlehem Shipbuilding Corp., 303 U. S. 41 .....6, 10, 13, 14, 21, 25
Natural Gas Co. v. Slattery, 302 U. S. 300 37
N. O. Public Belt R. Co. v. Ward, 182 F. (2d) 654..19, 21
Norwegian Nitrogen Prod. Co. v. United States, 288 U. S. 294 23
Order of R. Tel. v. N.O.T. & M. R. Co., 156 F. (2d) 1 14, 28, 32, 39
Order of R. Tel. v. N.O.T. & M. R. Co., 61 F. Supp. 869 .....17, 28, 29, 30
Order of Ry. Cond. v. Pitney, 326 U. S. 561.....3, 9, 12, 13, 34, 37, 41
Order of Ry. Cond. v. Southern R. Co., 339 U. S. 255 20
Order of Ry. Conductors v. Swan, 329 U. S. 520 23
Osmond v. Riverdale Manor, 199 F. (2d) 75 12
Petersen Baking Co. v. Bryan, 290 U. S. 570 37
Pope v. United States, 323 U. S. 1 .....14, 20, 21
Public Serv. Comm. v. Wycoff, 344 U. S. 237 .....6, 15
Radio Officers Union v. Nat. Med. Bd., 181 F. (2d) 801 18
Railroad Yardmasters of A. v. Indiana H. Belt R. Co., 166 F. (2d) 326 25
Slocum v. D. L. & W. R. Co., 339 U. S. 239.....19, 20, 24
Sunshine Coal Co. v. Adkins, 310 U. S. 381 16
Switchmen's Union v. Nat. Med. Bd., 320 U. S. 297..7, 16, 17, 24, 43, 44
System Fed. v. Louisiana & A. Ry. Co., 119 F. (2d) 509 25

Page

Southern Pac. Co. v. Joint Council, 165 F. (2d) 26 .. 25
Thomas v. Ramberg, 239 Minn. —, 60 N.W. (2d) 18 (1953) 12
Unemployment Comp. Comm. v. Aragon, 329 U. S. 143 37
United States v. Am. Trucking Assns., 310 U. S. 534 23
United States v. Babcock, 250 U. S. 328 16
United States v. Burlington & M. R. R. Co., 98 U. S. 334 23
United States v. L. A. Tucker Truck Lines, 344 U. S. 33 .....8, 37, 40
Washington Terminal Co. v. Boswell, 123 F. (2d) 235 .....19, 21
Wilder Mfg. Co. v. Corn Prod. Refg. Co., 236 U. S. 165 16
Wisconsin v. Illinois, 278 U. S. 367 23
Yakus v. United States, 321 U. S. 414.....6, 8, 11, 16, 17, 37, 40

CONSTITUTION:

Art. III, Sec. 2 15

STATUTES:

U.S.C., Title 28, Sec. 1254(1) 2

Railway Labor Act:

Sec. 2, Seventh 31, 44
Sec. 2, Tenth 31, 44
Sec. 3, First, (h) 33, 42
Sec. 3, First, (i) 42
Sec. 3, First, (j) 3, 5, 9
Sec. 3, First, (l) 5, 22, 23
Sec. 3, First, (p) 16, 25
Sec. 3, First, (q) 25
Sec. 5, First 44
Sec. 6 .....31, 44
Sec. 7 44
Sec. 9 44
Sec. 10 44

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 131

J. W. WHITEHOUSE, G. ORNDORFF, J. H. SYLVESTER, CLAUDE R. BARNES, R. SARCHETT AND THE ORDER OF RAILROAD TELEGRAPHERS, *Petitioners*,

v.

ILLINOIS CENTRAL RAILROAD COMPANY, WILLIAM H. CASTLE, R. M. BUTLER, C. P. DUGAN, E. T. HORSLEY AND J. E. KEMP, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals For the Seventh Circuit

---

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The District Court did not issue an opinion. Its findings, conclusions, and order are in the record. R. 35, 38, 40. The opinions of the Court of Appeals (R. 45, 57) are reported in 212 F. (2d) 22.

JURISDICTION

The judgment of the Court of Appeals was entered on March 19, 1954. R. 60. The jurisdiction of this Court is invoked under Section 1254(1) of the Judicial Code as amended. The petition for a writ of certiorari was filed June 11, 1954, and was granted October 14, 1954. The record as printed for this Court after grant of the writ was received November 30, 1954. On December 23, 1954 the time within which to file this brief was extended ten days.

QUESTIONS PRESENTED

1. Whether, prior to a decision by the National Railroad Adjustment Board on a contention of the carrier that a claim should be denied because the Board had not given notice to allegedly involved parties, there is a "case or controversy" between the carrier and the Board or its members.

2. Whether a referee, sitting with and as a member of a Division of the National Railroad Adjustment Board to consider and decide a claim on which the regular members have previously deadlocked, has authority to consider and decide whether "involved" parties are absent from the proceeding.

3. Whether, while the National Railroad Adjustment Board is considering a claim of a labor organization that a carrier has violated a collective bargaining agreement, and the carrier contends that an award should not be made because of the absence of allegedly requisite parties, a District Court has jurisdiction to enjoin the Board from giving further consideration to the claim until it has given notice to such allegedly requisite parties.

4. Whether respondent has exhausted its administrative remedies for its contention that requisite parties are absent from a proceeding before the National Railroad Adjustment Board, prior to the final decision of the Board.

5. Whether the judicial remedy provided by the Railway Labor Act for challenging the validity of an award of the National Railroad Adjustment Board, by way of defense to an enforcement suit, is exclusive.

6. Whether, if the National Railroad Adjustment Board should issue an invalid award, the defense of invalidity of the award in the statutory suit to enforce the award would be an adequate remedy to the carrier.

7. Whether, under Section 3, First, (j) of the Railway Labor Act, providing that the National Railroad Adjustment Board "shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes", in a dispute arising from a claim that a carrier has assigned work in violation of a collective bargaining agreement, notice is required to others than the claimants and the carrier.

8. Whether, in the event the answer to question 7 is in the affirmative, the Board is without jurisdiction to make a decision in the absence of such notice.

9. Whether, in the event the answer to question 7 is in the affirmative, actual knowledge of the proceeding by the others allegedly required to be given notice satisfies such requirement.

10. Whether the Court below misconstrued the decision of this Court in *Order of Ry. Cond.* v. *Pitney*, 326 U.S. 561, as holding that where it was claimed that certain work was contracted for in more than one collective bargaining agreement, it was the function of the Adjustment Board to "resolve the conflict".

STATUTES INVOLVED

The pertinent provisions of the Railway Labor Act (48 Stat. 1185, 45 U.S.C., Secs. 151 et seq.) are set forth in the appendix.

STATEMENT

This action was brought by the Illinois Central Railroad Company (hereinafter referred to as the "Railroad") against the National Railroad Adjustment Board, Third Division (hereinafter referred to as the "Board") and its individual members, including the referee, to enjoin the Board from making any disposition of a claim filed against the Railroad by The Order of Railroad Telegraphers (hereinafter referred to as the "Telegraphers"), until the Board should serve a notice of said claim on the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes (hereinafter referred to as the "Clerks") and upon an individual represented by the Clerks, and to compel said defendants to serve notice of the claim upon the Clerks and said individual. R. 3, 26, 32, 35. Preliminary and permanent relief were requested. R. 32. The Telegraphers were permitted to intervene as a defendant. R. 11.

The District Court granted a preliminary injunction against the Board prohibiting it from deciding the claim. R. 40. An appeal was taken by the Telegraphers and the members of the Board selected by the labor organizations (hereinafter referred to as the "Labor Members"). R. 42. The appellants below are the petitioners here. The respondents are the Railroad and the members of the Board selected by the carriers (hereinafter referred to as the "Carrier Members").

Although the parties are numerous, the facts are simple.

On July 1, 1951, the Telegraphers filed a claim with the Board alleging that certain work at Palestine, Illinois, subject to the contract between the Telegraphers and the Railroad, had been assigned by the Railroad other than as provided in the contract. The claim was docketed as No. TE-5722. R. 28. The work in question had been assigned to a position subject to the contract between the Clerks and the Railroad. R. 28. The Clerks advised the Railroad that while it took no position on the question

whether the Telegraphers' contract covered the work, it did take the position that its contract covered the work, and if the work should be assigned other than as provided in the Clerks' agreement it would present a claim for violation of its agreement. R. 13, 30-1, 38. The Railroad thereupon argued to the Board that the claim was not really against it but was a dispute between the Telegraphers and the Clerks and should be dismissed unless the two labor organizations were brought into the case. R. 28-9, 36-7. The Board did not serve a formal notice upon the Clerks to appear and be heard on the Telegraphers' claim, but the record before the Board showed that the Clerks had actual knowledge of the pendency of the proceeding. R. 12, 28-9, 34, 37.

The ten regular members of the Board divided evenly on the question whether the claim should be dismissed because the Board had not given notice to the Clerks, and pursuant to Section 3(1) of the Railway Labor Act a referee was selected to sit as an additional member of the Board and dispose of the claim. R. 13. When Docket No. TE-5722 came on for hearing before the Board with the Referee sitting as a member, one of the Carrier Members objected to proceeding with the hearing on the ground that formal notice had not been given to the Clerks or to members of the craft represented by the Clerks. R. 28-9, 37. When such objection was made, one of the Labor Members, who is a vice-president of the Clerks, stated that the Clerks were not "involved" in the dispute. R. 13. Railway Labor Act, Sec. 3, First, (j) directs that notice be given to persons "involved". The consideration of the objection was in private without the participation of the Referee. R. 29, 37. Upon resumption of the open hearing, the Carrier Member who had made the objection announced that his objection had resulted in a tie vote and was therefore lost. R. 29, 37. The hearing was resumed and argument presented to the Board by both sides. R. 29, 37. While the Board, with the Referee as a member, had the

case under advisement, this action was brought to enjoin the Board from making a decision until after notice is given to the Clerks. R. 27-8, 32.

SUMMARY OF ARGUMENT

1. The Railroad has not exhausted its administrative remedies. Whether the statutory direction of "due notice of all hearings to the employee or employees and the carrier or carriers involved" required notice to the Clerks in TE-5722, and if so, whether the Board may determine the claim in the absence of such notice, are among the questions which the Board will decide if permitted to do so. In this aspect of the case, it is indistinguishable in principle from *Aircraft and Diesel Corp.* v. *Hirsch*, 331 U.S. 752; *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41; *Macauley* v. *Waterman SS. Corp.*, 327 U.S. 540; *Jonco Aircraft Corp.* v. *Franklin*, 346 U.S. 11. Here, as in *Yakus* v. *United States*, 321 U.S. 414, the complainant cannot assume that it will be unsuccessful in the administrative proceeding.

2. Since the Board's decision may be in the Railroad's favor, the action is premature and there is no case or controversy. If the Board decides for the Railroad on any of the grounds the Railroad has urged, it is not harmed. The contention that the expense of participating in the administrative proceeding is legally recognizable harm is without substance, both because the hearings have been held and there remains nothing but for the Board to reach its decision, and because it has repeatedly been held to the contrary. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 51-2; *Aircraft and Diesel Corp.* v. *Hirsch*, 331 U.S. 752, 777-9; *Allen* v. *Grand Central Aircraft Corp.*, 347 U.S. 535, 540. Since there is no harm to the Railroad, now or imminent, and harm can result only from a series of contingencies, there is no case or controversy. *Eccles* v. *Peoples Bank*, 333 U.S. 426; *Pub. Serv. Comm.* v. *Wycoff Co.*, 344 U.S. 237; *Ashwander* v. *Tenn. Valley Auth.*, 297

U.S. 288, 324-5; *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 239, 240.

3. The remedy provided by the Railway Labor Act for challenging the validity of an Adjustment Board award is exclusive. Not only is it the general rule that the remedies provided by statute are exclusive, but it has repeatedly been held that such principle must be rigorously applied in matters subject to the Railway Labor Act, and but for the remedies provided by that Act in the railroad labor field, there were to be none. *Switchmen's Union* v. *Nat. Med. Bd.*, 320 U.S. 297; *General Committee* v. *MKT R. Co.*, 320 U.S. 323. The Act provides for the method of challenging the validity of Board action, in an enforcement suit. There may be no other.

4. The decision below transfers to the courts the initial decision of whether notice is required to third parties in any particular case, whenever the carrier desires to have the initial decision by the courts. Under that decision, the carrier may at any time seek to enjoin the Board from proceeding in the absence of additional notices, and the injunction would be granted or denied, as the court thinks additional parties are or are not involved. The decision below is predicated in part on the holding that the referee cannot base his decision on any question of notice. Such holding is admittedly without precedent, has frustrated the operation of the Act in such cases, and is contrary to the practice theretofore under the Act.

5. The remedy provided by the Act for challenging the validity of an award is adequate. If adverse to the Railroad, an award causes no harm unless the statutory enforcement suit is instituted. In such suit, any defense may be asserted, and if sound, no harm is caused the Railroad. There is thus no ground for equitable jurisdiction at this stage.

6. No notice to the Clerks was required. The jurisdiction of the Board is to decide disputes submitted to it. No

dispute between the Railroad and the Clerks has been submitted. The Clerks do not consider themselves involved in the dispute submitted by the Telegraphers. Notice to the Clerks would serve no purpose, for the Board could not decide a question not submitted, whether the Clerks' contract covers the work. There is no dispute between the Clerks and Telegraphers; and if there were, such dispute would be beyond the jurisdiction of the Board.

7. No notice was required to the clerk performing the work in question. Until this case, it had never been suggested, administratively or in court, that any such notice was required. In the absence of detailed seniority rosters, the Board would not know to what individual to give notice. And since the Clerks are shown to be aware of the situation and to have taken a position, it may be presumed they are authorized to take appropriate action on behalf of the individual clerk. *E. J. & E. R. Co.* v. *Burley*, 327 U.S. 661. No question of notice to the individual clerk was raised before the Board, and may not be raised by the Railroad now. *United States* v. *Tucker Truck Lines*, 344 U.S. 33.

8. The Clerks had actual knowledge of the Board proceeding, and deliberately refrained from any effort to participate. Such circumstance remedies any defect of lack of formal notice. Insofar as the Clerks would be bound by any decision had they received formal notice, they would be similarly bound under the circumstances. *E. J. & E. R. Co.* v. *Burley*, 327 U.S. 661, 666-7. Any past policy of the Board that would not permit the Clerks to participate in the absence of formal notice is irrelevent in the absence of its application in this case, especially since it is known the Clerks had no desire to participate. *United States* v. *Tucker Truck Lines*, 344 U.S. 33; *Yakus* v. *United States*, 321 U.S. 414, 434, 436.

9. The jurisdiction of the Adjustment Board is limited to the adjustment of grievances and the interpretation and

application of existing contracts in the case of a dispute between an employee or group of employees and a carrier or carriers. It is without any power to change any provision of any contract. If it appears that two or more contracts overlap or may overlap in specifying the work subject to their terms, the remedy lies elsewhere. The Court below erred in finding that *Order of Ry. Cond.* v. *Pitney*, 326 U.S. 561, holds that in such situation the Adjustment Board has the function "to resolve the conflict."

ARGUMENT

I. The District Court Was Without Jurisdiction to Grant an Injunction Because the Railroad Had Not Exhausted Its Administrative Remedies

In this case the Railroad seeks to have the Board enjoined from proceeding further to consider the claim filed by the Telegraphers because the Board had not given notice to the Clerks. Section 3, First, (j) of the Railway Labor Act directs that the Board "shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them." The Board did not give notice of the proceedings in question to the Clerks. The Railroad thereupon argued to the Board that it should not make an award in favor of the Telegraphers because the Clerks were "involved" and the Board could not properly make an award to the Telegraphers without having followed the direction to give notice to all parties "involved".

Whether the Clerks are "involved" in the dispute submitted by the Telegraphers, whether notice to the Clerks is therefore required, and whether the Board may properly proceed to determine the Telegraphers claim in the absence of such notice, are of course among the issues that the Board, with the referee sitting as a member, must decide and will decide if not enjoined from doing so. In such situation the District Court was without jurisdiction to

grant an injunction because the Railroad had not exhausted its administrative remedies. This is crystal-clear both on precedent and in reason.

In *Aircraft and Diesel Corp.* v. *Hirsch*, 331 U.S. 752; *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41; *Macauley* v. *Waterman Steamship Corp.*, 327 U.S. 540; *Jonco Aircraft Corp.* v. *Franklin*, 346 U.S. 11; and in many other cases, this Court has uniformly held that the continuation of administrative proceedings may not be enjoined on the ground that the administrative tribunal was without jurisdiction. In each of those cases this Court held that there could be no judicial determination of the agency's jurisdiction until the administrative proceeding was completed; if the administrative hearing or its result should be invalid, it could then be judicially declared invalid in an appropriate proceeding.

In *Aircraft and Diesel Corp.* v. *Hirsch*, 331 U.S. 752, while renegotiation proceedings were pending, the plaintiff sought a declaration that the proceedings could not properly be held because the Renegotiation Act was unconstitutional. This Court held that before there could be judicial intervention the administrative process must be completed, saying (at p. 767):

> "The doctrine, wherever applicable, does not require merely the initiation of prescribed administrative procedures. It is one of exhausting them, that is, of pursuing them to their appropriate conclusion and, correlatively, of awaiting their final outcome before seeking judicial intervention."

In *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, the plaintiff sought to enjoin the National Labor Relations Board from holding a hearing concerning an alleged unfair labor practice, claiming that the Board was without jurisdiction because no interstate commerce was involved and the mere holding of the hearing would cause irreparable injury. This Court held that there could be no judicial determination of the Board's jurisdiction until the

administrative proceeding was completed; if the administrative hearing or its result were invalid, it could then be judicially declared invalid. The Court said (at pp. 50-1):

> "No one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted."

In that case it was only a preliminary injunction that had been granted and from which an appeal had been taken, as in this case. This Court recognized that the granting of a preliminary injunction is a matter of discretion which would not ordinarily be reversed on appellate review except for a clear abuse of discretion, but it held that it was clearly an improvident exercise of discretion to grant a preliminary injunction where it appeared that the District Court was without jurisdiction because the administrative proceedings had not been completed. At p. 52.

Macauley v. *Waterman S.S. Corp.*, 327 U.S. 540, was a suit for an injunction against holding further administrative renegotiation proceedings and a declaration that the Price Adjustment Board was without jurisdiction because the contracts involved were with a foreign government and not with the United States. In accordance with well-established doctrine this Court held that the District Court was without jurisdiction to entertain the action because the administrative proceedings had not been completed.

Yakus v. *United States*, 321 U.S. 414, went farther. It involved a criminal prosecution for a violation of the price-control statutes, in which it was held that the defendants could not attack, in that proceeding, the validity of certain regulations since he had not availed himself of the administrative remedy for attacking them. It appeared that the petitioners had very good grounds for attacking the regulations in an appropriate administrative proceeding. Said this Court (at p. 437):

> "We cannot assume that petitioners, had they applied to the Administrator, would not have secured all the relief to which they were entitled."

Similarly here, we cannot assume that the Board will make an erroneous decision. In any event, until the Board makes its decision the courts are without jurisdiction to advise the Board of the correct decision.

Interesting applications adopted by other courts, with clear expositions of the principle, are found in *Osmond* v. *Riverdale Manor*, 199 F. (2d) 75 (4th Cir. 1952); *Forrest Harman & C* v. *Rottgering*, 106 F. Supp. 993; *Thomas* v. *Ramberg*, 239 Minn. , 60 N.W. (2d) 18 (1953); and the very recent decision of the Court of Appeals for the District of Columbia Circuit, *Am. Air Export and Import Co.* v. *O'Neill, et al.*, No. 12159, decided December 23, 1954.

In the Courts below the Railroad inexplicably relied on *Order of Railway Conductors* v. *Pitney*, 326 U.S. 561, for the proposition that equitable relief was warranted while the administrative proceeding was pending. In that case a petition had been filed for instructions to a trustee in bankruptcy to assign certain work to one craft rather than another, and for an injunction not to displace the men doing the work. This Court said (at p. 567):

> "The factual question is intricate and technical. An agency especially competent and specifically designated to deal with it has been created by Congress. Under these circumstances the court should exercise equitable discretion to give that agency the first opportunity to pass on that issue. Certainly the extraordinary relief of an injunction should be withheld, at least, until then."

Here we have the same agency, and here too it has been specifically designated to decide who is "involved" in a dispute submitted to it. Certainly it must be given the first opportunity to make a final decision, and "certainly the extraordinary relief of an injunction should be withheld, at least, until then."

The failure by the Railroad to exhaust its administrative

remedy was one of the reasons for which Judge Swaim[1] dissented from the decision below. After quoting from *Aircraft and Diesel Corp.* v. *Hirsch*, *supra*, and discussing the purposes of the Railway Labor Act, he cogently concluded (R. 57):

> "if either party to a claim before the Board were privileged to go into court and enjoin further proceedings by the Board each time the Board decided some preliminary matter or took, or failed to take, some procedural step to which the complaining party objected, there would be neither 'prompt' nor 'orderly' settlement of such disputes, and the above quoted fundamental purpose of the Railway Labor Act would be defeated."

II. The Action Was Premature Because the Board's Decision May be in Accord With the Railroad's Contentions. There Is Thus No Case or Controversy

We had supposed it axiomatic that before judicial relief could properly be sought a party must show that he has been or is being or is about to be hurt. In the instant case the Railroad may never be hurt by the allegedly improper procedure the Board is following. See *Order of R. Conductors* v. *Pitney*, 326 U.S. 561, 567; *Allen* v. *Grand Central Aircraft*, 347 U.S. 535, 539-40; *Myers* v. *Bethlehem Corp.*, 303 U.S. 41. As this Court said in *Order of R. Conductors* v. *Pitney*, *supra*, with respect to a different alleged violation of the Railway Labor Act:

> "Only after the Adjustment Board acts, but not until then, can it plainly appear that such relief is necessary to insure compliance with the statute." (At p. 567.)

[1] Prior to his appointment to the Court of Appeals, Judge Swaim had had very extensive experience in the administration of the Railway Labor Act, both as a referee in numerous Adjustment Board cases and as a member of several Presidential Emergency Boards established under Section 10 of the Act.

In the instant case the Board, if permitted to decide, may decide for the Railroad on the procedural ground or on the merits or on both. In any such event no harm would be caused to the Railroad. See *Order of R. Telegraphers* v. *N.O.T. & M. Ry. Co.*, 156 F. (2d) 1 (8th Cir., 1946), cert. den. 329 U.S. 758. To be sure, the Board might make a decision that would turn out, on appropriate judicial review, to be wrong. But the mere possibility of an erroneous decision is hardly the basis for enjoining administrative action. So long as the Board is given authority to decide questions, it must have authority to decide them either way. *Pope* v. *United States*, 323 U.S. 1, 14; *Burnet* v. *Desmornes y Alvarez*, 226 U.S. 145, 147, 57 L. Ed. 159. The Board, with a referee sitting as a member, has denied a number of awards to claimants because notice had not been given to third parties which were found to be involved. See, e.g., Third Division Awards Nos. 1193, 1400, 5432, 5433, 5599, 5600, 5627, 5644, 5751, 5759, 6051, 6052, 6072. Indeed, the very Referee on the claim here involved, who was one of the defendants in the District Court and is enjoined by that Court from giving further consideration to the claim, has on occasion voted to remand a claim for further proceedings because it appeared to him that notice had not been given to "involved" third parties and a jurisdictional dispute was presented. See Third Division Award 6224.

The Railroad contends that the mere holding of the hearing causes it harm because it is subjected to the expense of participation in a proceeding which can properly be decided only by not sustaining the claim. There are at least two determinative answers to such contention. It has repeatedly been held that administrative proceedings may not be enjoined on the ground that their continuance will harm one of the participants. *Myers* v. *Bethlehem Corp.*, 303 U.S. 41, 51-2 (claim of damage to labor relations and expense); *Aircraft and Diesel Corp.* v. *Hirsch*, 331 U.S. 752, 777-9 (multiplicity of suits and

expense); *Allen* v. *Grand Cent. Aircraft Corp.*, 347 U.S. 535, 540 (damage to bank credit). But the contention here is without basis in fact, for the administrative hearings have all been held and all that remains is for the Board to reach and announce its decision.

The prematurity of this lawsuit is, of course, but another aspect of the principle that judicial relief may not be sought until the administrative remedy has been exhausted. Until the Board sustains or denies the claim, it cannot be known whether there is a case or controversy of which the federal courts could have cognizance. Constitution, Art. III, Sec. 2. This is an action against the Board and its members. Until the Board makes a final decision, we cannot know whether it and the Railroad disagree about any question of fact or law or whether if there is disagreement it can cause the Railroad any harm.

The Railroad can be harmed only if the Board decides all issues contrary to the Railroad's contentions and sustains the Telegraphers' claim, and the Telegraphers then bring judicial proceedings to enforce the resulting award and are successful. We show below that in such judicial proceedings the Railroad may raise in defense every contention against the validity of the award that it is raising here, and that it may properly make such contentions only in such a judicial proceeding. Such a proceeding would present a "case or controversy", but until then there is none.

The primary test of "case or controversy" is a showing of present or imminently threatened legal harm. Here harm can result to the Railroad only if each of a series of contingencies eventuates. In such situation, no justiciable case or controversy is presented. *Eccles* v. *Peoples Bank*, 333 U.S. 426; *Great A. & P. Tea Co.* v. *Grosjean*, 301 U.S. 412, 429, 430; *Pub. Serv. Comm.* v. *Wycoff Co.*, 344 U.S. 237; *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 239, 240; *Ashwander* v. *Tenn. Valley Auth.*, 297 U.S. 288, 325; *Coffman* v. *Breeze Corp.*, 323 U.S. 316. At the present time

it is only on multiple contingencies that the Railroad can suffer harm. But "claims based merely upon 'assumed potential invasions' of rights are not enough to warrant judicial intervention." *Ashwander* v. *Tenn. Valley Auth.*, 297 U.S. 288, 324-5; *Eccles* v. *Peoples Bank*, 333 U.S. 426, 434.

III. The District Court Lacked Jurisdiction of the Subject Matter Because the Judicial Remedy Specified By the Railway Labor Act for a Carrier Challenging the Validity of An Award Is Exclusive

In this case the Railroad complains that the Board is following an improper procedure in considering a claim, and seeks judicial relief to require the Board to follow the allegedly proper procedure. If in fact the Board is not complying with the Railway Labor Act in the manner in which it is entertaining the claim, and if the defect (if there be one) is not remedied before an award is made, and if the ultimate award is in favor of the claimant, such award would be invalid. If then the Railroad fails to comply with the award, and the Telegraphers use the statutory method provided for obtaining compliance by bringing an action under section 3(p) of the Act, within two years, the Railroad will have full opportunity to challenge the validity of the award for having been arrived at through improper procedure or for any other reason. That is the judicial review of Board action afforded to carriers by the Railway Labor Act. We submit there may be no other.

It is of course the normal rule that where Congress has specified a particular administrative or judicial procedure, such procedure is exclusive. *Sunshine Coal Co.* v. *Adkins*, 310 U.S. 381, 404; *Switchmen's Union* v. *Nat. Med. Bd.*, 320 U.S. 297, 301; *Wilder Mfg. Co.* v. *Corn Products Refg. Co.*, 236 U.S. 165, 174-5; *United States* v. *Babcock*, 250 U.S. 328, 331; *Yakus* v. *United States*, 321 U.S. 414. Similarly, where it specifies a particular judicial remedy for the review of administrative action, the specification of such remedy precludes any other. *Anniston Mfg. Co.* v. *Davis*,

301 U.S. 337; *Order of R. Tel.* v. *N. O. T. & M. Ry. Co.*, 61 F. Supp. 869, 879-80; *Arnson* v. *Murphy*, 109 U.S. 238; *Yakus* v. *United States*, 321 U.S. 414.

Although such is the general rule, numerous decisions in this Court and in the lower courts show that it is applied with perhaps singular rigidity in the field of controversies in railroad labor relations. This Court has repeatedly and emphatically stated that in the field of labor controversies under the Railway Labor Act the courts are without jurisdiction of such controversies except those specifically vested in the courts by the Railway Labor Act, and that except for the administrative and judicial procedures specifically provided by the Act for the adjustment of controversies, there were to be no remedies. As this Court said in *Switchmen's Union* v. *Nat. Mediation Bd.*, 320 U.S. 297, 302:

> "Congress intended to go no further in the use of the processes of adjudication and litigation than the express provisions of the Act indicate."

In *General Committee* v. *MKT R. Co.*, 320 U.S. 323, this Court granted certiorari because of the importance of the problems raised by the courts interfering in controversies governed by the Railway Labor Act, 320 U.S. 323, 327. After reviewing the history of railway labor legislation, this Court discussed the availability of judicial remedies in this field, and said:

> "But it is apparent on the face of the Act that while Congress dealt with this subject comprehensively, it left the solution of only some of those problems to the courts or to administrative agencies. * * * In short, Congress by this legislation has freely employed the traditional instruments of mediation, conciliation and arbitration. Those instruments, in addition to the available economic weapons, remain unchanged in large areas of this railway labor field. On only certain phases of this controversial subject has Congress utilized administrative or judicial machinery and invoked the compulsions of the law. Congress was

dealing with a subject highly charged with emotion. Its approach has not only been slow; it has been piecemeal. Congress has been highly selective in its use of legal machinery. The delicacy of these problems has made it hesitant to go too fast or too far. The inference is strong that Congress intended to go no further in its use of the processes of adjudication and litigation than the express provisions of the Act indicate.

"That history has a special claim here. It must be kept in mind in analysing a bill of complaint which, like the present one, seeks to state a cause of action under the Railway Labor Act and asks that judicial power be exerted in enforcement of an obligation which it is claimed Congress has created." (At pp. 332-3.)

In view of such considerations, this Court concluded (at p. 337):

"In view of the pattern of this legislation and its history the command of the Act should be explicit and the purpose to afford a judicial remedy plain before an obligation enforcible in the courts should be implied. Unless that test is met the assumption must be that Congress fashioned a remedy available only in other tribunals. There may be as a result many areas in this field where neither the administrative nor the judicial function can be utilized. But that is only to be expected where Congress still places such great reliance on the voluntary process of conciliation, mediation and arbitration. See H. Rep. No. 1944, 73d Cong., 2d Sess., p. 2. Courts should not rush in where Congress has not chosen to tread."

So strong was this doctrine that although this Court agreed that the Court below had properly decided that the petitioner was not entitled to relief, it reversed because the Court below had entertained the case, and remanded with instructions to dismiss for lack of jurisdiction. And see *General Committee* v. *Sou. Pac. Co.*, 320 U.S. 338. See also *In re Central R. of N. J.*, 145 F. (2d) 351 (3d Cir., 1944), affd. 326 U.S. 561; *Radio Officers Union* v. *Nat. Med.*

Bd., 181 F. (2d) 801, 802 (D.C. Cir., 1949), where the Court said that no matter how erroneous the action involved might be, "Congress chose not to confer any judicial remedies in a case such as this."

Such are the holdings even in cases where but for the relief sought by the plaintiffs in those cases, no judicial relief was available. Surely it cannot seriously be argued that Congress and this Court meant that no judicial remedies were to be available in this field except for those specifically provided for by the Railway Labor Act but that in cases for which the Act does provide a specific judicial procedure for testing the validity of administrative action other remedies should also be available.

In *Washington Terminal Co.* v. *Boswell*, 124 F. (2d) 235 (D.C. Cir., 1941), affd. by an equally divided court, 319 U.S. 732, the Court of Appeals for the District of Columbia discussed fully many aspects of this subject. The opinion contains a detailed review of the provisions of the Railway Labor Act. In the light of those detailed and comprehensive provisions for the adjustment of controversies, and the explicit and implicit purposes of Congress in enacting the provisions pertaining to Adjustment Board awards, the Court concluded:

> "We think Congress intended the courts during that period [the two-year period within which suits for the enforcement of Board awards might be brought] to keep hands off these controversies except in the manner provided in the Act." (At p. 244)

The same ruling was made in *N. O. Public Belt R. Comm.* v. *Ward*, 182 F. (2d) 654 (5th Cir., 1950), citing the *Boswell* case and *Slocum* v. *D. L. & W. R. Co.*, 339 U.S. 239.

In the *Boswell* case, as here, it appeared that two labor organizations each claimed that the carrier had contracted with it for the assignment of certain work, and the carrier thought it should have a judicial remedy not provided for in the Railway Labor Act to determine its liabilities. To that argument, the Court said:

> "But if it were shown that the carrier had bound itself by conflicting contracts allocating the work * * * it would not follow that the enforcement suit is inadequate *or was not intended to be exclusive* * * * We know of no constitutional protection against the consequences of making inconsistent contracts concerning the same subject matter *nor of any which renders inadequate a proceeding, otherwise sufficient, merely because others not parties to it may assert claims inconsistent with its result* and perhaps succeed in sustaining them by independent litigation." (At p. 248. Italics supplied.)

The Court held that the declaratory judgment procedure was intended to provide a judicial remedy where none existed before; it was not intended to displace existing judicial remedies, particularly special remedies designed for special subjects of litigation. (At p. 248.)

In *Slocum* v. *D. L. & W. R. Co.*, 339 U.S. 239, this Court again held that the procedures of the Railway Labor Act were exclusive with respect to the matters there dealt with:

> "This reasoning equally supports a denial of power in any court—state as well as federal—to invade the jurisdiction conferred on the Adjustment Board by the Railway Labor Act." (To the same effect see *O.R.C.* v. *Southern R. Co.*, 339 U.S. 255, 94 L. Ed. 542.)

The Railroad here argues that the Act requires the Board to give notice to the Clerks in a situation presented to it such as in Docket No. TE-5722. If that is so, then the Board must first decide whether Docket No. TE-5722 is such a situation. Certainly it must be within the jurisdiction of the Board to decide whether Docket No. TE-5722 presents a situation in which the Clerks should be given notice. *Pope* v. *United States*, 323 U.S. 1, 14. The Board has not yet made a final decision on that subject. Until it does, no court can properly decide that question, because no court has jurisdiction to do so. And for at least two years after the Board decides that question, no

court may review the decision other than in an enforcement suit. *Washington Terminal Co.* v. *Boswell*, 124 F. (2d) 235 (D.C. Cir., 1941); *N.O. Public Belt R. Comm.* v. *Ward*, 182 F. (2d) 654 (5th Cir., 1950).

But, argues the Railroad, it appears that the Board may decide that question erroneously. There are numerous answers to such contention, some of which are dealt with elsewhere in this brief. It is sufficient to make but three observations here. First, the Board may not decide the question erroneously. Second, if it does make a wrong decision, and the decision hurts the plaintiff in this action, the Railway Labor Act provides the exclusive method of review, in an enforcement proceeding. And perhaps most significantly in this connection, jurisdiction of a tribunal to make a decision includes jurisdiction to make a wrong as well as a right decision. *Pope* v. *United States*, 323 U.S. 1, 14; *Burnet* v. *Desmornes y Alvarez*, 226 U.S. 145, 147, 57 L. Ed. 159; *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41. Every argument made by the Railroad here, attacking the validity of the potential award if it should be in favor of the Telegraphers, would be available to it in the judicial proceeding provided for by the Act, if such a proceeding should materialize. Under the Act, and under the repeated and emphatic pronouncements of this Court, such arguments are available only in such proceeding.

IV. The Decision Below Transfers to the Courts the Resolution of Questions Vested in the Adjustment Board for Initial Decision

The Court below held that the Board, with the referee sitting as a member, should be enjoined from proceeding further with the case because notice had not been given to certain allegedly involved parties, holding that the referee had no authority to participate in deciding whether third parties were involved, and if so, their identity. R. 51-2. The Court conceded that it could find no precedent for such holding. R. 51. It based such holding simply on the

reasoning that the Act provides for the appointment of a referee only to sit with the Board and make an award, that such provision contemplates that all procedural requirements of notice have already been met, that the authority of the referee to sit as a member of the Board has no relation to the obligation of the Board to give notice to "involved" parties, and that the Board has no power to proceed to do anything until all notices have been given. R. 52.

Such holding has utterly frustrated the operation of the Railway Labor Act with respect to claims presented to the Board in which the carrier makes the contention that notice to others than the claimant and the carrier is required.

Prior to the decision below in this case, when the Labor Members and the Carrier Members of the Board deadlocked on a carrier contention that notice was required to others than the claimants and the carriers, a referee was appointed pursuant to section 3, First, (1) of the Railway Labor Act to sit with the Board as a member and decide the case. This was done in scores, if not hundreds, of cases from the time the Board was created until the decision below in this case. Referees sitting with the Third Division passed on the question of notice in at least the following awards of that Division: 371, 844, 902, 903, 1193, 1309, 1400, 2253-8 (containing a detailed review of the question by Referee Swaim, now Judge Swaim), 2548, 2549, 2550, 2551, 2552, 2553, 2596, 2597, 2650, 2651, 3932, 3933, 3934, 3999, 5432, 5433, 5599, 5600, 5627, 5644, 5702,[2] 5751, 5759, 5781, 5785, 5790, 5865, 5867, 5993, 6051, 6052, 6072, 6115, 6203,[2] 6204, 6205, 6206, 6224, 6306, 6357. Such practical interpretation and application of the Act from the very beginnings of the Board, without anyone challenging its propriety until very recently, and with the National Mediation Board continuing to appoint referees

[2] Containing pertinent discussions by experienced referees.

in such situation until the decision below, should be conclusive.[3]

Perhaps even more conclusive is the fact that the prior practice worked; it was successful in getting the disputes resolved. But since the decision below in this case, the National Mediation Board no longer makes appointments of referees in such cases. (This is not shown in the record because it happened after the decision below, but respondents will not deny the fact.) Thus the administration of such claims is paralyzed, and the claims are simply piling up, because there is no way that the deadlock can be administratively solved under the decision below. In such cases, in effect, the administrative procedures of Section 3, First, (1) have been stricken from the Act by the decision below, and there has been substituted resort to the courts.

Even if the National Mediation Board should again appoint referees in such cases, the situation would not be improved, and under the decision below would probably be worsened and lead to a flood of additional litigation. Even with referees on the Board, the decision below effectively transfers from the Board to the Courts the initial determination of any contention that third parties are "involved", and if they are, their identity. If a referee is appointed, the decision below holds that the carrier may seek and obtain an injunction against the Board, with the referee sitting as a member, proceeding with its consideration of the claim. If the court finds that third parties are "involved", the injunction would issue. If the court finds that third parties are not involved, presumably the injunction would not issue and consideration by the Board

[3] United States v. Burlington & M. R.R. Co., 98 U.S. 334, 341; Norwegian Nitrogen Prod. Co. v. United States, 288 U.S. 294; Brown v. United States, 113 U.S. 568; Wisconsin v. Illinois, 278 U.S. 367, 413; Lucas v. American Code Co., 280 U.S. 445, 449; United States v. Am. Trucking Assns., 310 U.S. 534, 549; cf. Order of Ry. Conductors v. Swan, 329 U.S. 520, 529; M'Keen v. Delaney's Lessee, 5 Cranch 22, 32; Edwards' Lessee v. Darby, 12 Wheat. 206, 210.

could proceed. But in either event it would be the court, and not the Board, that would make the initial decision whether third parties are "involved."

All this is the present and potential situation in the administration of a statute with respect to which this Court has repeatedly and emphatically stated that the courts have a minimum function, and except where expressly conferred, no function, with the administrative processes having priority of operation even where not expressly provided. *Slocum* v. *D. L. & W. R. Co.*, 339 U.S. 239; *Switchmen's Union* v. *Nat. Med. Bd.*, 320 U.S. 297; *General Committee* v. *MKT R. Co.*, 320 U.S. 323. If the administrative process in this type of case is to function as intended, and as it functioned prior to the decision below, with the courts not deciding issues presented to the Board at least until after the Board had decided them, a reaffirmation of the principles of the foregoing cases is necessary.

V. There Is No Case for Injunctive Relief Because Even If the Board Should Issue An Invalid Award the Statutory Remedy of a Defense to An Enforcement Suit Would be Adequate

It is a truism of course that the extraordinary equitable remedy of an injunction should not be granted unless there is no legal remedy or the legal remedy is clearly inadequate. It is clear, and it has been held, that the statutory remedy for an award improperly arrived at or otherwise defective, by way of defense to an enforcement suit, is adequate.

It should be observed first that the awards of the Board are not self-enforcing. The mere existence of an award (or, in this case, the existence of the possibility of an award) in favor of the claimant deprives the carrier of nothing. The Board issues awards, but it does nothing about obtaining compliance with them. If the carrier does not comply with an award in favor of a claimant, then the

claimant has two years within which to bring the statutory proceeding for enforcement of the award. Railway Labor Act, Sec. 3(p), (q). If the carrier does not comply, and an enforcement suit is not instituted within two years, the carrier has lost nothing. Cf. *Myers* v. *Bethlehem Corp.*, 303 U.S. 41, 48-9. If suit is brought by the claimant, then the carrier may raise in defense of the suit every argument that the Railroad is making here as well as any others that it might think of later. In *Aircraft and Diesel Corp.* v. *Hirsch*, 331 U.S. 752, 775-7, this Court held as a ground for denying judicial intervention, pending the conclusion of administrative renegotiation proceedings, the circumstance that after the administrative proceedings were concluded the subcontractor could raise every question he was there urging in a suit against his prime contractor. In a number of cases enforcement of an Adjustment Board award has been denied for a variety of defects. *Atlantic Coast Line R. Co.* v. *Pope*, 119 F. (2d) 39 (4th Cir., 1941); *System Federation* v. *L. & A. Ry. Co.*, 119 F. (2d) 509 (5th Cir., 1941); *Railroad Yardmasters of America* v. *Indiana H. Belt R. Co.*, 166 F. (2d) 326 (7th Cir., 1948); *Dahlberg* v. *Pittsburgh & L. E. R. Co.*, 138 F. (2d) 121 (3d Cir., 1943); *Southern Pac. Co.* v. *Joint Council*, 165 F. (2d) 26 (9th Cir., 1948); *Brotherhood of Railroad Signalmen* v. *A. T. & S. F. Ry. Co.*, No. 52-C-320; Northern District of Illinois, Eastern Division. And, in an appropriate case, enforcement may be denied because of lack of notice to involved parties and their lack of actual knowledge. *Estes* v. *Union Terminal Co.*, 89 F. (2d) 768 (5th Cir., 1937); *Kirby* v. *Penna. R. Co.*, 188 F. (2d) 793 (3d Cir., 1951).

But, says the Railroad, a court of equity should intervene in this situation with an injunction, because it could decide the issues in one case while the decision of them by the statutory procedures would require a multiplicity of suits. First, it should be observed that the "multiplicity" the Railroad fears is two. Second, the "multiplicity" of

two suits would occur only if the Board decides this case in favor of the Telegraphers both on the procedural points and on the merits, and renders an award in favor of the Telegraphers; then the Railroad fails to comply with award; then the Telegraphers bring an enforcement suit; then the Telegraphers prevail in that suit; then the Railroad assigns the work in question in accordance with the Telegraphers' agreement; then the Clerks bring proceedings before the Adjustment Board; then the Board renders an award in favor of the Clerks; then the Railroad fails to comply with the award; and then the Clerks bring judicial enforcement proceedings. Each and every one of those contingencies, many of them quite speculative, must occur before there could be a "multiplicity" of as many as two suits. In *Aircraft and Diesel Corp.* v. *Hirsch*, 331 U.S. 752, 778-81, this Court held that a potential multiplicity of sixteen or more suits was no excuse for not following the administrative procedure through to conclusion.

Furthermore, the intervention of equity in this situation would almost certainly not avoid the "multiplicity" even if all the foregoing contingencies occurred. If all of them occurred there would be two suits, but in order for one case to settle the issues that otherwise might require two cases, the following would have to occur: this case would have to be decided in favor of the Railroad; the Clerks would then have to come before the Board and argue on a question in which they have no interest, whether the Telegraphers' contract covers the work, and would argue also that their contract covers the work; the Board would have to decide a question not before it, whether the Clerks' contract covers the work; the determination by the Board of an issue not before it would have to be binding on the Clerks. The absence of any one of those conditions would prevent the avoidance of multiplicity. And even if all those conditions were present, and the Railroad failed to comply with the award and an enforcement suit were

brought, we would be right back to two suits. And if the Board did not make a final determination of the question not before it, whether the Clerks' contract covers the work, there would of course be no avoidance of the possibility of two suits.

The very making of the argument of multiplicity emphasizes the analysis *infra*, under Point VI, of the futility of the professed purpose of this litigation, to require that notice be given to the Clerks. If the Clerks do not appear after notice or if the Board does not decide a question not before it, the possibility of "multiplicity" is not avoided. It might be avoided only if the Board has power to decide and does decide, in a proceeding brought by the Telegraphers claiming a breach of its contract, that either the Telegraphers' contract or the Clerks' contract covers the work and the other does not, or that if both cover the work one of them is thereby, or perhaps retroactively, changed. In the absence of such a determination, all this litigation by the carriers is inevitably futile. The Railroad points to nothing, nor can it, to show the Board has jurisdiction to make any such determination. See the very cogent statement in the concurring opinion in *Estes* v. *Union Terminal Co.*, 89 F. (2d) 768 (5th Cir., 1937), at pp. 773-4, and in the dissenting opinion below. R. 59.

VI. No Notice Was Required to be Given to the Clerks

This issue is the basic issue between some of the carriers and the labor organizations under the Railway Labor Act concerning the jurisdiction of the Adjustment Board, and underlies all the other issues in this case. It is one of the questions pending before the Board for decision in this case but which the Court below has predetermined for the Board. It deals with the justiciable controversy that would exist if the Board decides this issue contrary to the Railroad's contentions and also decides the merits of the Telegraphers' claim of contract violation against the Rail-

road. It is one of the questions that have been argued before the Board. The Railroad's case must be predicated on the proposition that if the Board decides this issue contrary to the Railroad's contentions it will be irreparably injured. We will show that if the Board decides it contrary to the Railroad's contentions it will be deciding it correctly.

This issue is one of first impression in this Court, although it has been a subject of litigation in the lower courts for many years. The Seventh and Eighth Circuits have reached opposite conclusions, and the Third Circuit has indicated views in accord with the Seventh Circuit. We believe the decisions expounded by the Court of Appeals for the Eighth Circuit present the sound answer.

This question was fully considered and resolved in *Order of Railroad Telegraphers* v. *N. O. T. and M. R. C.*, 61 F. Supp. 869 (D.C., E.D. Mo., 1945), affd. 156 F. (2d) 1 (8th Cir., 1946). This Court denied a petition for certiorari, 329 U.S. 758, and denied a rehearing on the petition for certiorari, 329 U.S. 829. The facts involved in that case brought this issue into sharp focus. It appeared that prior to bringing the action the Telegraphers had sought to intervene in a Board proceeding brought by the Clerks; the basis for seeking intervention was that the Clerks' claim before the Board covered work that was subject to the Telegraphers' contract and was being performed under that contract. The Board denied intervention holding that its authority was to adjudicate the controversy between the claimant before it on the one hand and the carrier on the other, and that it had no authority to adjudicate disputes between two groups of employees. It then decided that the assignment of the work to employees not covered by the Clerks' agreement was a violation of that agreement. The Telegraphers sought in the District Court to have the award so obtained declared invalid and its application enjoined.

In comprehensive opinions both in the District Court and in the Court of Appeals it was held that not only did

the Telegraphers not have a right to appear in the Adjustment Board proceedings brought by the Clerks but that it could not properly be a party to those proceedings. The basis of the holding was that the resolution of the question whether the Telegraphers had a contract covering the work in question depended upon its contract and not on the provisions of the Clerks' contract, and it had no standing to argue whether the carrier had contracted also with another organization concerning the same work. The Court of Appeals held that insofar as a jurisdictional dispute between unions might be involved in the Adjustment Board proceedings the Board was without jurisdiction to decide it; that the Railway Labor Act left the resolution of such controversies to the National Mediation Board and Emergency Boards; and that the Adjustment Board could properly pass only on the interpretation or application of contracts between employees and carriers.

The language of Judge Hulen in the District Court in the same case indicates what we believe is the real purpose of the Railroad in this litigation, and of other carriers in pending related cases. 61 F. Supp. 869. In holding that the Telegraphers had no right to intervene in the proceedings on the Clerks' claim, he pointed out that "no controversy between the carriers and plaintiff Telegraphers' Union was presented to the Adjustment Board." At page 877.

> "The real question which the plaintiffs would have tried, had they been permitted to intervene before the Adjustment Board * * * was the limits within which collective bargaining agreements of the organizations with the carriers were effective—were the work and positions affected by the alleged overlapping of the two agreements properly within the Telegraphers' craft or the craft represented by the Clerks' Union?" At p. 877.

The answer to the question of asking the Board to pass on such matters was clear:

> "We find no basis in the sections of the Act setting up the Adjustment Board for concluding that Congress gave to the Adjustment Board jurisdiction or power to determine disputes between rival labor organizations." At p. 878.

The opinion shows that had the Adjustment Board permitted intervention and determined that the work in question was properly embraced within the contract of one craft and improperly included in the other, such decision would have been clearly beyond the Board's jurisdiction, and a nullity. The opinion concluded:

> "We are unable to find any authority, and we have not been cited to any, in support of the proposition that the National Railroad Adjustment Board has power to pass upon and determine jurisdictional controversies between rival unions and abrogate, in whole or in part, collective bargaining agreements between unions and carriers." At p. 879.

That, we believe, is precisely what the carriers are seeking, to have the federal courts require the Board to pass upon questions of craft jurisdiction and abrogate, in whole or in part, contracts between carriers and labor organizations when the improvidence of a carrier might have otherwise subjected it to liability for breach of contract.[4] They are thus seeking what they have never asked Congress to enact, and what we believe they would oppose enactment of concerning other questions, namely compulsory arbitration. And it would not be any ordinary compulsory arbitration, as of a question whether a particular provision should or should not be included in a contract. What would be arbitrated would be the question which of two contracts which a carrier has negotiated and signed with two craft organizations, contracting to assign certain work to each of the crafts, the carrier may

[4] This was recognized by Judge Swaim in his dissenting opinion below and, we submit, was irrefutably answered by him. R. 57-60, esp. at p. 59.

repudiate with impunity. In other words, what the Railroad must really be seeking in this litigation is a determination that when it appears that a carrier may have contracted with two crafts that certain work shall be assigned to each of them, the craft representatives should be subjected involuntarily to the Adjustment Board deciding which of the two contracts should be kept in effect and which should be modified or declared of no effect with the carrier free to ignore it. Section 6 of the Act provides the exclusive method of changing contracts. Section 2, Seventh, prohibits changing rules embodied in contracts in any manner other than as provided in Section 6. Section 2, Tenth, makes it criminal to violate Section 2, Seventh.

That such is the thrust of this litigation is made more apparent from an analysis of the possible, perhaps probable, consequences if the Board had given notice to the Clerks. The plaintiffs may say that its purpose is simply what it asks for, a requirement that the Clerks be notified of the Telegraphers claim. Suppose a formal notice had been issued by the Board, and the Clerks had ignored it or otherwise had not participated in the proceeding. It appears that the Clerks are of the view that they are not involved in the Telegraphers' claim. R. 13. Presumably, the worst consequence to the Clerks that would result from not participating would be that the issue determined would be *res judicata* as to it. But what issue is it that would be determined and would be *res judicata?* It would be simply the determination that the Telegraphers contract covers the work. But the Clerks do not dispute that the Telegraphers contract covers the work; they take no position on that issue. Surely the plaintiffs are not seeking so hollow an accomplishment as the Clerks' being bound to a proposition they have never disputed.

Little purpose would be served by citing other holdings and by distinguishing each of the cases on which the respondents rely by showing that in those situations the other party allegedly "involved" had no contract for the

work or that it was the right of the other party that was the issue in the claim presented to the Board. An Adjustment Board proceeding and a statutory judicial enforcement suit are not available in such a situation. In such situation the other party may have an interest in arguing to the Board that the claimant's contract does not cover the work, for in such situation his continuing to perform the work depends on the claimant's contract not covering the work. But where the other party has its own contract, on which it relies for its rights, and has no interest in the claimant's contract, it is meaningless to say that it is "involved" in the dispute.

This distinction is apparently observed by the Court of Appeals for the Eighth Circuit. The first case in that Court was the *N. O. T. & M. Case*, 156 F. (2d) 1. In that case the Telegraphers had sought to intervene in a proceeding before the Board brought by the Clerks claiming that certain work assigned to a telegrapher should have been assigned to a clerk. Intervention was denied, and the Clerks obtained an award. The Telegraphers brought suit to enjoin the application of the award. The Court held that in such situation the Telegraphers, claiming the work under their contract, had no right to be heard in the Clerks' proceeding and was properly denied intervention, because its rights depended on its contract and not on the Clerks' contract being inapplicable.

The next case was *Bro. of R. Trainmen* v. *Templeton*, 181 F. (2d) 527 (8th Cir., 1950). There the Trainmen had presented a claim to the Board claiming that work assigned to a baggageman should have been assigned to a brakeman under the Trainmen's contract. The baggageman's work was not covered by a contract, and the man doing the work had no contract rights to any employment. It was held notice was required in that situation.

It must be apparent from the foregoing that the Court consciously makes the distinction we urge. The contrary position is predicated on the Court flatly reversing itself

without doing it expressly and without even citing the case it was allegedly overruling.

The Railroad apparently takes the position that in claims such as are involved here the Board has authority to make not only a binding interpretation of the claimant-Telegraphers' contract which the claimant contends was violated, but also a binding interpretation of the Clerks' contract. If the Board has such authority, then the Clerks' contract would be interpreted in a proceeding not brought by the Clerks nor against them, at a time not of their choosing, and in a factual situation they may deem inappropriate.

That such was not the intention of Congress in enacting the Railway Labor Act is irrefutably evidenced by the structure of the Act. This dispute happens to involve allegedly overlapping contracts of the Telegraphers and Clerks, and the interpretation of the contracts of both those crafts is within the jurisdiction of the Third Division. But similar situations arise with respect to other crafts, such as signalmen and shopcrafts, or brakemen and train porters. For example, contracts pertaining to signalmen are interpreted by the Third Division, and contracts governing shopcrafts are interpreted by the Second Division. In such situation, indistinguishable in principle from the instant case, obviously we could not have both contracts authoritatively interpreted in the same proceeding.

Section 3(h) of the Railway Labor Act provides:

> "The said Adjustment Board shall be composed of four divisions, *whose proceedings shall be independent of one another*, and the said divisions . . . shall be as follows:
>
> * * * *
>
> Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers . . .
>
> Third division: To have jurisdiction over disputes involving . . . signalmen . . ." (Italics supplied.)

In a signalmen-shopcraft situation, would a division of the Board have jurisdiction specifically precluded to it by the Act? Would the signalmen in such a dispute have their contract authoritatively interpreted by the Second Division if a shopcraft presented a claim, a division in which the signalmen have no voice in the selection of members but the shopcrafts do? Would the shopcrafts have their contract authoritatively interpreted by the Third Division if the signalmen presented a claim, a division in which the shopcrafts have no voice in the selection of members but the signalmen do? Examples could be multiplied almost indefinitely. Obviously, any answer to any of the above questions but an emphatic negative is unthinkable, and would fly in the teeth of the Act. And it is impossible to make any distinction between such situations and the instant situation, so far as having any contract but the one allegedly being violated interpreted authoritatively in any proceeding. If the requirement of notice to others than the claimant and the carrier is limited, as we think it should be limited and heretofore has been limited in any final adjudication, to situations where the person doing the work is not governed by any contract on which he relies, none of the above insoluble problems can arise.

Of course, in considering the Telegraphers' claims, the Board was apprised of the existence of the Clerks' contract. If permitted to decide, it will take that fact into consideration, as well as the custom and practice in the industry. Cf. *Order of Ry. Cond.* v. *Pitney*, 326 U.S. 561. All this is pointed out in the dissent below by Judge Swaim, and is unanswered. R. 58.

It is clear that the underlying and pervading issue in this case is whether Congress intended to confer on the Board the authority and power to arbitrate, whether or not the unions desired arbitration, issues of which of two collective bargaining agreements should be modified or declared of no effect when the carrier contracted in both of them for the same work. In this aspect this case bears

close similarity to *General Committee* v. *MKT R. Co.*, 320 U.S. 323 and *General Committee* v. *Southern Pac. Co.*, 320 U.S. 338. To hold that Congress intended to confer such jurisdiction on the Adjustment Board in legislation to the enactment of which the railroad labor organizations gave their support, would probably be the most startling development in the history of railroad labor relations, and would create chaos. That Congress enacted no such provision is shown below in Point IX.

VII. No Notice Was Required to be Given to Any Individual Clerk

The argument and authorities cited above in Point VI are of course fully applicable to the Railroad's contention that the Board cannot proceed until it gives notice to the individual clerk. There are additional reasons why any contention that notice to individual clerks is required in this situation cannot be sustained.

Until the complaint was filed in this action, it had apparently never occurred to anyone that in a situation where the person performing the claimed work was himself covered by a collective bargaining agreement, notice was required to such person. This case is the very first in which any such contention was urged. The practical interpretation and application of the Act for a period of 19 years by everyone concerned, including the agency, the carriers, and the employees, should be conclusive.[5]

Furthermore, any such requirement is utterly impracticable. The claimant before the Board does not ask that anyone be removed from any position. In a claim such as the instant one it claims simply that certain work performed by others should be performed by employees under the Telegraphers agreement. In such situation the Adjustment Board has no way of knowing how much time such work requires. Thus the Board had no way of knowing whether the sustaining of the Telegraphers claims

[5] See cases cited in footnote 3.

would result in the abolition of a clerk's position. An administrative body must necessarily assume that there is no defect of interested parties until there is a challenge that there is such defect. The Board cannot know what other parties might conceivably be affected unless they are told. Furthermore, if the job of the person performing the work would be abolished in the event the claim submitted to the Board were to be sustained, in the normal situation the person performing the work would not be the one who would feel the greatest impact of such action; normally, he would exercise his seniority rights to displace someone else. It is the person at the bottom of the seniority roster who would thus feel the greatest impact, since he is the one who would most likely become unemployed. But the Board is not furnished with copies of seniority rosters.

In such situation, if notice is required to anyone, contrary to what we believe is the statutory requirement, it would seem to be fairly clear that such person should be someone on the seniority roster junior to the employee performing the work. If a clerk's position might be abolished as a result of sustaining the Telegraphers' claim, something the Board would not know, the Board would also not know the place of the incumbent on the seniority roster, nor the identity of the individual who might become unemployed as a result of sustaining the claim. Yet to this day no one, a carrier, the Board, or a referee has ever taken the position that notice should be given to others on the seniority roster.

The fallacy of holding that notice was required to the individual clerk was also pointed out by Judge Swaim in his dissent below. R. 58. Cf. *Elgin, J. & E. R. Co.* v. *Burley*, 325 U.S. 711, and particularly the language in the opinion on rehearing, 327 U.S. 661, 663-6, and in the dissenting opinion at page 676.

Furthermore, lack of notice to the individual clerk was never raised before the Board. The Board was never asked to give notice to the individual clerk. And even in its

argument that the claim should not be granted because of lack of notice to all "involved", the only defect urged to the Board was that "each organization" should have been given the opportunity to present its case. R. 28. The Railroad should not be permitted to come into court and argue that the Board's decision, if adverse to the Railroad, will be wrong for a reason never advanced to the Board. *United States* v. *Tucker Truck Lines*, 344 U.S. 33; *Yakus* v. *United States*, 321 U.S. 414; *Unemployment Compensation Commission* v. *Aragon*, 329 U.S. 143, where this Court said:

> "The contention does not seem to have been raised or pressed by respondents up to that point. The responsibility of applying the statutory provisions to the facts of the particular case was given in the first instance to the Commission. A reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the Commission of an opportunity to consider the matter, make its ruling, and state the reasons for its action." (At p. 155)

See also *Macauley* v. *Waterman S.S. Corp.*, 327 U.S. 540; *Order of Ry. Conductors* v. *Pitney*, 326 U.S. 561, 567.

It follows, *a fortiori*, from such principle that the Railroad should not be permitted to have the Board enjoined for failure to take action which no one, complainant or otherwise, ever asked it to take, for such principle should be applied most rigorously where the claimant seeks the extraordinary relief provided by a court of equity. *Natural Gas Co.* v. *Slattery*, 302 U.S. 300, 310; *Order of Ry. Cond.* v. *Pitney*, 326 U.S. 561, 567; see also *General Utilities Co.* v. *Helvering*, 296 U.S. 200, 206; *Petersen Baking Co.* v. *Bryan*, 290 U.S. 570, 575.

Also, in accord with the views expressed in *Elgin, J. & E. R. Co.* v. *Burley*, 327 U.S. 661, and the facts that the Clerks are aware of the Board proceeding, have considered the situation, have declared that they do not consider any rights under their contract involved in the Telegraphers'

claim, and have announced that they will make appropriate claim if any such rights are infringed, it may fairly be presumed that the Clerks are authorized to act for the individual unless there is a showing to the contrary. There is no allegation or other showing to the contrary. Cf. *Kirby* v. *Penna. R. Co.*, 188 F. (2d) 793 (3d Cir., 1951).

The only argument the Railroad ever made to the Board concerning notice was that the claim be dismissed for lack of notice. The Board now has under advisement whether it shall do so, but is enjoined from making a decision. It should be permitted to decide the only issue concerning notice the Railroad has asked it to decide.

VIII. Even If Notice to the Clerks Was Required, Such Requirement Was Satisfied by the Clerks' Actual Knowledge of the Proceeding

It is conceded that the Clerks had actual knowledge of the proceedings on the Telegraphers' claim. R. 12, 28-9, 34. Prior to the decisions below in this case, it had been uniformly held in every case posing the question, including decisions by the Courts of Appeals for the Third, Fifth, and Seventh Circuits, that where notice to third parties of a claim before the Board was required, such requirement was satisfied without formal notice if the third parties had actual knowledge of the proceedings. *Estes* v. *Union Terminal*, 89 F. (2d) 768 (5th Cir., 1937); *Hunter* v. *A. T. & S. F. Ry. Co.*, 188 F. (2d) 294 (7th Cir., 1951), cert. den. 342 U.S. 819, reh. den. 342 U.S. 889; *Kirby* v. *Penna. R. Co.*, 188 F. (2d) 793 (3d Cir., 1951). The reasoning of these holdings is that if a party in interest knows of the proceeding and stands by and permits the Adjustment Board to make its decision, without making any effort to apprise the Board of his views, he cannot later complain that the decision was erroneous or unauthorized. Cf. *Elgin, J. & E. R. Co.* v. *Burley*, 327 U.S. 661, 666-7.

The Railroad argues, and persuaded a majority of the Court below, that the previous holdings concerning the

effect of actual knowledge must be overruled because, they say, it has been the policy of the Board not to permit any parties other than those given formal notice to participate in Board proceedings. Perhaps they can make such a showing, although they give no indication of how long ago it was that any effort was made by anyone who had not received formal notice to appear in a proceeding. It is at least doubtful that any such effort has been made since the Telegraphers tried it and were rejected and the rejection sustained in *O. R. T.* v. *N. O. T. & M. R. Co.*, 156 F. (2d) 1 (8th Cir., 1946), cert. den. 329 U.S. 758, reh. den. 329 U.S. 829.

There are at least two basic errors in this argument of the respondents.

First, if we assume the policy alleged by the plaintiffs, and assume further that the Clerks want to appear in proceedings brought by the Telegraphers but would not be permitted to do so, and assume still further that the Board would be in error in refusing to permit the Clerks to appear, then the error would be in the refusal to permit the Clerks to appear. Such error would have absolutely no significance to the question of whether actual knowledge is a substitute for formal notice. The Board conceivably could refuse to permit the Clerks to appear after formal notice as well as after knowledge without notice. If the Board would not permit the Clerks to appear, that may be error according to the respondents' argument. But the remedy there would be to require the Board to rectify that error by permitting the Clerks to appear if they desire to do so, not by enjoining the Board from making a decision until it gives formal notice.

Second, any past policy of the Board is irrelevant. Before complaint may be made of error, the error must be shown in the particular case. Certainly the respondents cannot show that the Clerks tried to appear without notice and were not permitted to do so. In the absence of such a showing, the question of policy is irrelevant. In *United*

States v. *L. A. Tucker Lines*, 344 U.S. 33, it was urged that the Interstate Commerce Commission had a predetermined policy on a subject which would have required it to overrule an objection if the objection had been made. This Court held that the existence of such a policy did not constitute error in the particular case; it held that before the proceedings below could be challenged as invalid an attempt must have been made to have the Commission follow the proper procedure. To the same effect is *Yakus* v. *United States*, 321 U.S. 414, 434, 436. The improper procedure involved in this point, if any there be, would be the refusal of the Board to permit the Clerks to appear. We know from the record that the Clerks do not desire to appear. It is beyond reason to argue that the Board should be enjoined from making a decision because it has a policy that would erroneously prevent the Clerks from appearing if they wanted to do so, when the Clerks have made no effort to appear and we know they have no desire to appear.

Furthermore, it cannot be disputed that any considerations pertaining to the Clerks' contract that may pertain to the Telegraphers' claim has been fully presented to the Board and will be fully considered by it. This was pointed out by Judge Swaim in his dissent below. R. 58. In addition, one of the members of the Third Division is a vice-president of the Clerks, lending further assurance that if in determining the Telegraphers' claim any considerations should arise that may be of interest to the Clerks, they will not go unrecognized or unconsidered.

The reasoning of this Court in *Elgin, J. & E. R. Co.* v. *Burley*, 327 U.S. 661, 666-7 is applicable here. If, as is the fact, the Clerks have full knowledge of the proceeding, consider themselves not "involved", and deliberately refrain from making any effort to participate, they will not be in a position to attack the validity of the award. In such circumstances, any proper interest of the Railroad in having considerations pertaining to the Clerks' contract

presented to the Board, other than by the Railroad, is satisfied. Once again the conclusion is inescapable that the true purpose of this litigation is to obtain judicial revision of the Railway Labor Act to subject the labor organization to compulsory arbitration of retroactive revision of possibly overlapping collective bargaining agreements. See the comments of Judge Swaim, R. 59-60.

IX. The Board Is Without Jurisdiction to Revise Contracts to Remove Overlaps in Their Scope

The Court below stated that it was the opinion of this Court in *Order of Ry. Cond.* v. *Pitney*, 326 U.S. 561, that where it appeared that two collective bargaining representatives each claimed certain work was subject to the agreement between it and the carrier, it was "the function of the Adjustment Board to resolve the conflict." R. 56.

In the *Pitney* case, this Court did say that in interpreting and applying the scope of a collective bargaining agreement in the railroad industry, a particular agreement should be read in the light of others that the carrier may have made, as well as in the light of usage, practice and custom in the industry. At p. 567. Of course we have no quarrel with any such proposition. Presumably the Board will act in accord with such principle; certainly there is no allegation to the contrary.

Any such doctrine as that announced by the Court below would impose on collective bargaining in the railroad industry perhaps the most revolutionary procedure ever established in this country with respect to labor relations, in the railroad industry or elsewhere. Not only has it not been enacted by Congress or expounded by this Court, it would directly reverse the Congressional enactments and the decisions of this Court. It would impose on railroad labor compulsory arbitration, not simply of what changes should be made in the jurisdictional scope of collective agreements, but of what such changes should be retroactively decreed. See the discusson *supra*, under

Point VI. Let us look at the statutory provisions and the relevant decisions of this Court.

The jurisdiction of the Divisions of the Adjustment Board is set forth in subsections (h) and (i) of section 3, First, of the Railway Labor Act (45 U.S.C., Section 3, First, (h), (i)). Subsection (h) allocates the total jurisdiction among the four Divisions, and is not relevant here. Subsection (i) provides in relevant part:

> "(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements . . . shall be handled in the usual manner . . . ; but, failing to reach adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board . . ."

Plainly the jurisdiction of the Adjustment Board is limited to disputes between employees and carriers. It has no jurisdiction to revise agreements. (See the dissent of Judge Swaim below, R. 59-60.) The dispute in Third Division Docket No. TE-5722 was one between employees, represented by the Telegraphers, and a carrier, respondent Illinois Central Railroad Company. That dispute was over the interpretation and application of the agreement between those two parties, and the dispute was whether that agreement required certain work to be assigned under the rules of that agreement. There is no dispute between the Clerks and the Railroad over that question. Apparently the Railroad has assigned the work under the Clerks' agreement, and the Clerks apparently think such assignment was proper. Since the Clerks and the Railroad are in agreement on that question, there is no dispute between them to be referred to the Adjustment Board, and no such dispute has been referred to the Adjustment Board. The Board thus has no dispute before it in which it can make an authoritative determination that the Clerks' contract does or does not cover the work. And it is

only in the case of such a dispute that the Board can make such an award. To be sure, if the Telegraphers' claim is sustained, and if the work is then assigned under the rules of the Telegraphers' agreement, there may then arise a dispute between the Clerks and the Railroad. If those events all materialize, and if such dispute is unsuccessfully "handled in the usual manner" and is then referred to the Adjustment Board, it will then be within its province to make an authoritative interpretation of the Clerks' agreement. But not until then.

The Board may decide in Docket No. TE-5722 that there has been no violation of the Telegraphers' agreement. Or if a dispute arises over the meaning of the Clerks' agreement, it may decide that that contract does not apply to the assignment of the work in question. Or it may decide that both contracts contain provisions for the assignment of the work, or that neither of them does.

Nor is any dispute presented between the Clerks and the Telegraphers. The Clerks apparently take no position on whether the scope rule of the Telegraphers' agreement includes the work. R. 13, 30-1. But even if there were such a dispute, its resolution would be beyond the jurisdiction of the Adjustment Board because it would not be a dispute between "an employee or group of employees and a carrier or carriers." If there is any procedure for the resolution of such a dispute, it lies elsewhere. Or it may be subject only to negotiation, mediation, conciliation, and voluntary arbitration. See *General Committee* v. *MKT R. Co.*, 320 U.S. 323, 337; *General Committee* v. *Southern Pacific Co.*, 320 U.S. 338, 343-4; *Switchmen's Union* v. *Nat. Med. Bd.*, 320 U.S. 297, 302.

Of course, the result may be that in appropriate proceedings awards may be issued one of which holds that the scope rule of the Telegraphers' agreement applies to the work and the other of which holds that the Clerks' agreement applies to the work. If one contracts in two different contracts to sell the same house to different people,

or to employ different people to perform the same work, he cannot by showing such fact, or showing that maybe such fact exists, bring both parties into court and have it decided which party ought to receive the house or the work and have it decreed that there should be no liability to the other. Certainly he could not require some real estate board or some labor board to make such decision and decree, simply because it operates in the general field, unless he could show some authority in the board to do so. If the Railroad has in fact contracted with both organizations for the same work, such circumstance gives it no right under any statute or the common law or any other law to have it adjudicated that it shall be relieved of one of its contracts. In any event, there is no jurisdiction in the Adjustment Board to make any such adjudication.

In the two *General Committee* cases and in the *Switchmen's Union* case, *supra*, this Court unequivocally held that except for administrative and judicial remedies specifically provided by the Railway Labor Act, there were to be no remedies in this field. See discussion *supra* under point III. The holding below reverses both the enactments of Congress and the pronouncements of this Court.

Although probably irrelevant, it may be pointed out that the Railroad is not without remedy. If in fact it has contracted with two organizations for the same work, or if it fears that it may have done so, the Railway Labor Act specifies the procedure for changing either or both of the agreements. Section 6; section 5, First; section 2, Seventh, Tenth; section 7; section 9; section 10. Those procedures provide for notice, negotiation, mediation by the National Mediation Board, and possibly arbitration or Emergency Board proceedings. Under Sections 2, Seventh and Tenth, and under the decisions of this Court cited above, there is no right to any other procedure.

CONCLUSION

Wherefore, the decision of the Court of Appeals should be reversed and the case remanded to the United States District Court for the Northern District of Illinois, Eastern Division, with instructions to dissolve the injunction and dismiss the Complaint.

Respectfully submitted,

MILTON KRAMER

January 3, 1955

STATUTORY PROVISIONS INVOLVED

Railway Labor Act (Pub. No. 257, 69th Cong., appd. May 20, 1926, 44 Stat. 577, as amended by Pub. No. 442, 73rd Cong., appd. June 21, 1934, 48 Stat. 926), 45 U.S.C. ch. 8; U.S.C.A., Title 45, secs. 151 et seq.

Section 2, Seventh:

> "No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act."

Section 2, Tenth:

> "The willful failure or refusal of any carrier, its officers, or agents to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000 nor more than $20,000 or imprisonment for not more than six months, or both fine and imprisonment for each offense, * * *."

Section 3, (h):

> "The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:
>
> "First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organizations of the employees.
>
> "Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, carmen, the

helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

"Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

"Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

Section 3, (i):

"The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

Section 3, (j):

"Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them."

Section 3, (l):

"Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as 'referee', to sit with the division as a member thereof and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an ward. * * *."

Section 3, (p)

"If a carrier does not comply with an order of a division of the Adjustment Board within the time limit is such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the pe-

titioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board."

Section 3, (q):

"All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after."

Section 6:

"Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. * * *."